No. 18412

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MANUEL LEE MATYSEK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdiction and Statement of the Case.

The Federal Grand Jury for the Southern District of California returned Indictment No. 30295 on November 22, 1961, charging appellant and a codefendant with violation of Title 21, United States Code, Section 174 in four counts. Thereafter, on February 15, 1962, appellant and her codefendant were found guilty on all counts in a bench trial before the Honorable Thurmond Clarke. On May 2, 1962, motion for judgment of acquittal or a new trial was denied, and she was sentenced to 5 years in prison on each count to run concurrently. On May 4, 1962, appellant gave notice of appeal.

The jurisdiction of the District Court was based on Title 18, United States Code, Section 3231, and this

Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.

Statute Involved.

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

III.

Statement of Facts.

Isaiah J. Abney, a special employee of the Federal Bureau of Narcotics, testified that the subject of narcotics first came up in a conversation with appellant when she asked him if he had any narcotics. Abney had none and asked appellant if she knew where he could get some. Appellant said she would check and see. [R. T. 32.][1]

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[1]R. T. refers to Reporter's Transcript.

On May 2, 1961, Abney telephoned appellant and asked her if she had found out anything about getting him some narcotics; she replied that she had and that he was to come to her house and she would be able to get the narcotics for him. [R. T. 33.]

On May 3 or 4, 1961, appellant telephoned Abney and asked him if he was ready to make a buy. [R. T. 34.] On May 8, 1961, appellant again telephoned Abney and told him she was ready if he was. [R. T. 35.] After narcotic agents searched Abney and furnished him $160.00, he went to appellant's house, gave her the money and received some change. Appellant then left and after about 45 minutes returned with a container of narcotics [Ex. 1], which she handed to Abney. [R. T. 35-36.] Shortly thereafter, Abney gave the narcotics to Agent Roumo. [R. T. 38.]

On May 12, 1961, Abney telephoned appellant about making another purchase of narcotics. She said that she would have to check because she though she had another source. [R. T. 40.] On May 13, 1961, after being searched and furnished money by narcotic agents, Abney went to appellant's house and gave her the money. She left for a few minutes and returned with the narcotics [Ex. 2] which Abney turned over to Agent Roumo. [R. T. 41-43.]

Sometime later in May, 1961, appellant told Abney she and someone else had a disagreement about past transactions, and that Abney would have to wait and call her back later because she had to check to see if she could get another source. On May 23, 1961, Abney telephoned appellant and was told by her that he would have to be at her house before the noon

hour because she had to be downtown to get the narcotics from working people when they were off for lunch. [R. T. 45-46.] On May 25, 1961, after being searched and supplied with money by narcotics agents, Abney went to appellant's house, picked her up, and drove to 9th and Los Angeles Streets in downtown Los Angeles. There, co-defendant Lillian Johnson came out of a building and entered Abney's car. [R. T. 46-47.] Johnson directed Abney to a location where she left the car for about 30 minutes and returned with the narcotics which were given to appellant. Abney then drove the two women to appellant's house, where she gave him the narcotics [Ex. 3] which he turned over to Agent Roumo. [R. T. 47-49.]

On June 1, 1961, Abney again telephoned appellant and was told by her that she would have to wait a day or two before they could take care of "our business." [R. T. 50.] The next day, June 2, Abney telephoned appellant and was told that they would have to be downtown during the noon hour again because "these people" were off for lunch at noon. Abney was then searched and furnished money by narcotic agents. He drove to appellant's house, picked her up, and proceeded downtown to 9th and Los Angeles Streets where they again met defendant Johnson. Johnson directed them to the same location as on their previous contact. Again she left the car for a short period of time and returned with narcotics [Ex. 4]. [R. T. 50-51.] On both of the occasions on which Johnson was involved, Abney had given money to appellant who turned it over to Johnson. [R. T. 49, 51-52.]

Although Abney and appellant bought and used narcotics together, he never sold her any narcotics, and was not engaged in the selling of narcotics at the time of the transactions here involved. [R. T. 55-58, 121.]

Abney made no deal of any kind with the narcotic officers [R. T. 59-60, 70-71] and was not told that they could do something for him if he would turn in narcotic vialators. [R. T. 68.] In fact, Abney was sentenced to five years as a narcotics violator [R. T. 62] and his automobile used in the transportation of narcotics was seized by narcotic agents and not returned. [R. T. 69.]

Agent Aubrey A. Roumo, of the Federal Bureau of Narcotics, corroborated Abney's testimony that the latter had placed telephone calls on May 2, 3, 4, 8, 13 and 23, 1961, to a female answering to the name of "Lee" in order to make arrangements to purchase narcotics [R. T. 129-133, 136, 156], and that Abney had gone to appellant's apartment on May 8, and 13, 1961, after which appellant was observed to leave and reenter the apartment. Subsequently, Abney left and turned over Exhibits 1 and 2 to narcotics officers. [R. T. 134-138, 148-149.]

Agent Roumo and others followed Abney on May 25 and June 2, 1961, when the latter picked up appellant in a car and drove her to downtown Los Angeles where defendant Johnson met them. [R. T. 157, 163.] On each date defendant Johnson was observed to leave and re-enter the car and on each occasion shortly thereafter, Abney turned over narcotics [Exs. 3 and 4 respectively] to Agent Roumo. [R. T. 160, 163-164.]

Agent Meyer Goodman of the Federal Bureau of Narcotics also witnessed the two downtown meetings between appellant, defendant Johnson and Abney. [R. T. 219-221.]

Appellant Matysek stated that she had a heart condition, a thyroid condition, a protruding hernia, an abscessed tooth, had been in a car accident in 1961, and as a result of her various ailments had been given narcotic medications from time to time. [R. T. 235-236.] She testified that Abney sold narcotics to her, but she did not sell any to him. [R. T. 237, 238.]

Appellant testified that on several occasions in May, 1961, prior to the 25th of that month, Abney telephoned and tried to *sell* her narcotics. [R. T. 241.] According to appellant, Abney asked if she could get him some narcotics, and suggested that she try her friend Lillian Johnson. [R. T. 243-244.] Appellant admitted the transactions with Johnson in which Exhibits 3 and 4 were involved [R. T. 244-246], and admitted that she had previously been convicted of possessing narcotics. [R. T. 265-266.]

Clifford A. Davis, M.D., testified that he examined appellant in October, 1961, and prescribed drugs for her, one of which was a narcotic to relieve pain. [R. T. 278.]

Florence Thomas testified that she is appellant's mother, that appellant came to her house in the spring of 1961, and that during this time an unknown male telephoned the Thomas residence on several occasions and asked for appellant. [R. T. 283-285.] Mrs. Thomas said she told the caller that appellant did not want to talk to him, and that appellant told him the same thing. [R. T. 287.]

IV.

The Question Presented.

The sole question presented by this appeal is whether the facts, taken in the light most favorable to the government, show that appellant was entrapped.

V.

Argument.

The Supreme Court has said that entrapment occurs:

> "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States,* 287 U. S. 435, 442 (1932).
>
> "The fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law enforcement officials." *Sherman v. United States,* 356 U. S. 369, 372 (1958).

The asserted defense of entrapment presents an issue to be passed upon in the first instance by the trier of fact. *Sorrells v. United States,* 287 U. S. 435, 452 (1932). On appeal, the finding of the trier of fact must be sustained if, taking the view most favorable to the government, there is substantial evidence to support it. *Glasser v. United States,* 315 U. S. 60 (1942); *Buford v. United States,* 272 F. 2d 483 (9

Cir. 1960); *Johnson v. United States,* 270 F. 2d 721 (9 Cir. 1959); *Cert. den.* 362 U. S. 937 (1960).

As the Supreme Court stated in passing upon the issue of entrapment in *Sherman v. United States,* 356 U. S. 369, 373 (1958),

> ". . . we are not choosing between conflicting witnesses, nor judging credibility. . . . We reach our conclusion from the undisputed testimony of the prosecution's witnesses."

Under the above rules, the evidence is not to be taken as that testified to by appellant and her witnesses and recited in her brief, but is to be viewed in the light most favorable to the government. When this is done, there is virtually no similarity between *Sherman, supra,* on which appellant relies, and the present case.

In *Sherman v. United States,* 356 U. S. 369, 371 (1958), the Supreme Court stated the facts as follows:

> "From mere greetings, conversation [between Kalchinian, the government informer, and petitioner] progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics. Finally Kalchinian asked petitioner if he knew of a good source of narcotics. He asked petitioner to supply him with a source because he was not responding to treatment. From the first, petitioner tried to avoid the issue. Not until after a number of repetitions of the request, predicated on Kalchinian's presumed suffering, did petitioner finally acquiesce."

The subsequent narcotic sales were made for the sum of twenty-five dollars.

In the present case, the subject of narcotics first came up between appellant and Abney when *she asked him* if he had any narcotics. When he replied in the negative and asked if she knew where he could get some, she said she would check and see.

On the 3rd or 4th of May, 1961, *appellant telephoned Abney* and asked him if he was ready to make a buy. Again, on May 8, 1961, *she telephoned Abney* and told him *she was ready if he was.*

On May 12, 1961, when Abney inquired about making another purchase of narcotics, appellant said that she would have to check because she thought *she had another source.* Later in May she also told Abney she and someone else had a disagreement about past transactions and she had to check to see if she could get *another source.*

During late May and early June, appellant sold narcotics to Abney on *four occasions*—twice at her home and twice at rendezvous with Abney and codefendant Lillian Johnson. On each occasion appellant received large sums of money from Abney. Prior to the last sale, appellant told Abney they would have to wait a day or two before they could take care of "our business."

The evidence shows that appellant did not try to avoid the issue of narcotics, but was the first to bring it up. She did not refuse to sell narcotics until after repeated urgings, but said at the first inquiry that she would check and see if she could get some.

Appellant was not an unwilling person convinced by Abney's several telephone calls and other contacts to sell him narcotics. His telephone calls were preliminary contacts customary in the narcotics trade. Further, some of the calls were initiated by appellant rather than Abney.

In short, appellant initiated and pursued the subject of narcotics in her contacts with Abney, and actively planned the narcotic transactions which subsequently occurred. Prior to Abney's requests therefor, appellant was already disposed to sell and was in the business of selling narcotics, as can be seen by her references to "another source", by the amounts of money she received for her sales, and by the characterization of her transactions with Abney as "our business."

The evidence shows that appellant is not an innocent person induced by the Government to commit a crime. She is a criminal caught by strategy necessarily employed in the detection of narcotics violations.

VI.

Conclusion.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Assistant U. S. Attorney